Supreme Court, U. S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

No. 79-678

In the Supreme Court

OF THE

United States

OCTOBER TERM 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellants,

VS.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE, CITY OF SAN JOSE, CALIFORNIA, NATIONAL LEAGUE OF CITIES, AND OTHER JOINING CITIES OF CALIFORNIA, IN SUPPORT OF APPELLEE

ROBERT J. LOGAN
CITY ATTORNEY
COUNSEL OF RECORD
GARY B. REINERS
SR. ASSISTANT CITY ATTORNEY
151 W. Mission Street
San Jose, CA 95110
Tel. (408) 277-4454
Attorneys for Amicus Curiae

BOWNE-PERNAU WALSH • 1045 SANSOME ST. • S.F., CA 94111 • (415) 981-7662

TABLE OF CONTENTS

	Page
Statement of the case	1
Interest of amici curiae	2
Summary of argument	3
Arguments	5
I	
Pennsylvania Coal is of dubious value as precedent in the decision of today's land use regulation cases	5
A. The Holmes opinion in Pennsylvania Coal cannot be harmonized with its own contemporaries	6
B. The 1980's model "Bundle of Sticks" is not the same as the 1880's model "Bundle of Sticks"	7
C. The reasoning of Pennsylvania Coal has proved inadequate to serve as a basis for any rational analytical framework	9
D. Pennsylvania Coal should be overruled or limited to its facts	11
E. A "Taking" in the Pennsylvania Coal sense does not necessarily imply "just compensation"	14
II	
The pragmatic and policy ramifications of this case are of overwhelming importance	16
A. Modern regulation more often involves the timing and direction of development than long term prohibition of use	17
III	
Regulation of growth is properly housed in the legislative forum, not the judicial forum	21
IV	
An inverse remedy will unreasonably impact judicial administration	25
V	
The unresolved "Single Parcel" issue	26
Conclusion	27

TABLE OF AUTHORITIES CITED

Cases

	Page
Adkins v. Children's Hospital, 261 U.S. 525 (1923)	6
Agins v. City of Tiburon, 24 C.3d 266 (1979)	14, 16
Agins v. City of Tiburon, ... U.S. ....., 65 L.Ed.2d 106 (1980)	4
Associated Home Builders, etc. Inc. v. City of Livermore, 18 C.3d 582, 135 Cal.Rptr. 41, 557 P.2d 473 (1976)	19
Barbaccia v. County of Santa Clara, et al., Civil No. C-7601182 S.W., N.D. Cal. (Judgment entered in favor of defendant June, 1980)	25
Berman v. Parker, 348 U.S. 26, 99 L.Ed 27 (1954)	24
Bibb v. Navajo Freight Lines Inc. (1959) 359 U.S. 520	13
Block v. Hirsch, 256 U.S. 135 (1920)	7, 11, 12
Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court, 13 C.3d 225, 118 Cal.Rptr. 158, 529 P.2d 582 (1974)	19
Consolidated Rock Products Co. v. City of Los Angeles (1962) 57 C.2d 515, appeal dismissed, 371 U.S. 16 (1962)	14
Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L.Ed. 303 (1926)	21, 22
Fred F. French Investment Co. v. City of New York, 385 N.Y.S.2d 5, 350 N.E.2d 381, appeal dismissed, 429 U.S. 990 (1976)	12
Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962)	12, 27
Golden v. Planning Board of Town of Ramapo, 30 N.Y. 2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972)	19
Hadacheck v. Sebastian, 239 U.S. 394, 60 L.Ed. 348 (1915)	27
Just v. Marinette County, 56 Wis.2d 7, 201 N.W.2d 761 (1972)	13

Table of Authorities Cited

Cases

Page

Lochner v. New York, 198 U.S. 45 (1905) 6, 11, 12, 27
Marblehead Land Co. v. City of Los Angeles (9th Cir. 1931) 47 F.2d 528 14
McCarthy v. City of Manhattan Beach (1953) 41 Cal. 2d 879, cert. den., 348 U.S. 817 (1954) 7, 14
Mugler v. Kansas, 123 J.S. 623 (1887) 10, 13
Nebbia v. New York, 291 U.S. 502 (1934) 13
Oceanic California Inc. v. City of San Jose, Civil No. C-78-2622-AJZ (Motion to dismiss granted August 21, 1980) 25
Pamel Corporation v. Puerto Rico Highway Authority, 621 F.2d 33 (1980) 15
Penn Central Transportation Co. v. New York City, 438 U.S. 104, 57 L.Ed.2d 631 (1978) 3, 9, 23, 24, 27
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 67 L.Ed. 322 .....3, 4, 5, 6, 7, 9, 10, 11, 12, 13, 14, 15
Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092 (9th Cir. 1976) 22
Sederquist v. City of Tiburon, 590 F.2d 278 (9th Cir. 1978) 22
Truax v. Corrigan, 257 U.S. 312 (1921) 6
U.S. v. Carolene Products Co. (1937) 304 U.S. 144 13
Village of Belle Terre v. Boraas, 416 U.S. 1, 39 L.Ed.2d 797 (1974) 24

TABLE OF AUTHORITIES CITED

Constitution

Page

United States Constitution:
Fifth Amendment 11, 12
Fourteenth Amendment 11, 12

Statute

California Code of Civil Procedure, Section 1268.510 16

Other Authorities

"Compact Cities: Energy Saving Strategies for the '80's," (Report of the Sub-committee on the City of the Committee on Banking, Finance and Urban Affairs, House of Representatives, July 1980) 18, 20

Deutsch, "Land Use Growth Controls: A Case Study of San Jose and Livermore, California" (1974), 15 Santa Clara Lawyer 1 19

Dunham "Griggs v. Allegheny County in Perspective: 30 years of Supreme Court Expropriation Law" (1962) 63, Sup. Ct. Rev. 105 9

Holmes-Pollack Letters, Mark de Wolf Howe (ed.), 108-109 (1941) 7

"Preserving America's Farm Land—A Goal The Federal Government Should Support", General Accounting Office, Washington, D.C. 1979 20

An Urban Strategy for California (Feb. 1978), Cal. Office of Planning and Research 18

"Urban Transportation and Energy: Potential Saving of Different Modes", Congressional Budget Office, Washington, D.C., December, 1977 20

Van Alstyne "Taking or Damaging by Police Power: The Search For Inverse Condemnation Criteria", 44 So. Cal. L. Rev. 1 (1970) 9, 10

No. 79-678

In the Supreme Court

OF THE

United States

OCTOBER TERM 1980

SAN DIEGO GAS & ELECTRIC COMPANY,
Appellants,

VS.

CITY OF SAN DIEGO, et al.,
Appellees.

On Appeal from the Supreme Court of California

BRIEF OF AMICUS CURIAE, CITY OF SAN JOSE, CALIFORNIA, NATIONAL LEAGUE OF CITIES, AND OTHER JOINING CITIES OF CALIFORNIA, IN SUPPORT OF APPELLEE

STATEMENT OF THE CASE

Amicus curiae adopt in full the statement of the case made by appellee City of San Diego (hereinafter "San Diego").

INTEREST OF AMICI CURIAE

A decision in this case favoring claims in inverse condemnation based on police power regulation will undoubtedly shape the character and conduct of land use from this point forward. Although the legal issues raised are of constitutional stature and thus of great importance, the practical consequences that could flow from the decision are of even greater dimensions. The very face of urban and suburban America may be altered in the future by the decision in the case at bar.

Amicus Curiae City of San Jose, the cities participating individually in this brief, and all those cities represented by Amicus National League of Cities all have one thing in common. They are in the forefront of land use regulation. They are, if you will, "where the buck stops." San Jose and many other cities have been fiscally impacted by the costs of defending against inverse law suits. The costs of defense alone can be astronomical. When a judgment in favor of a landowner results, fiscal impact can become fiscal trauma.

A decision by this Court establishing a comprehensive inverse condemnation remedy would affect every city, town and hamlet in this country. Whether a city is currently affected by growth problems or not, it still has its land use squabbles. To the extent that a sharp sword could be placed in every landowner's hand by the establishment of a comprehensive inverse condemnation remedy, every community is this nation has a very real interest in the outcome of this case.

SUMMARY OF ARGUMENT

The cornerstone of logical growth in a modern, complex society is the imaginative and rational application of land-use planning techniques. Now, more than ever, there is a direct interrelationship between sound land-use policies and energy, resources, recreation, and the environment.

Amici curiae are, in varying degrees, the focal point of most real battles over land use. Traditionally, local legislators have been assured substantial discretion in reaching the often difficult decisions necessary to confront the responsibility thrust upon them by modern society. Not every decision is perfect—far from it. There are even those decisions that unintentionally exceed the bounds of their discretion.

Yet it is often very difficult to separate the good decisions from the bad, and even harder . . . "to develop a 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by government, rather than remain disproportionately concentrated on a few persons." *Penn Central Transportation Co. v. New York City,* 438 U.S. 104, 57 L.Ed.2d 631 (1978).

Amici curiae suggest that *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 67 L.Ed. 322, never intended to require that invalid police power regulation inexorably lead to a cause of action or claim for relief for monetary compensation. The holding in *Pennsylvania Coal* should be reevaluated. The decision does not support what it has come to stand for. The result has been utter confusion in attempting to interpret its meaning—without benefit to either the government or the landowner.

Case law following *Pennsylvania Coal* has never accepted the remedy of forced purchase for adoption of excessive regulation without intended public use, even where diminution of property values has resulted. In addition, a forced purchase remedy in inverse condemnation is inconsistent with the statutes in many states permitting abandonment of direct condemnation action.

Amici urge that the preferred remedy for overzealous regulation is invalidation. Invalidation has always been an accepted remedy in non real property cases where excessive regulation has resulted in economic loss. There is no reason to apply a different standard where real property is involved. Such a remedy avoids the "chilling" effect that potential inverse liability has on innovative planning; it avoids judicial usurpation of the legislative prerogative; it avoids the onerous impact on judicial administration by disposing of long, unnecessary and often harassing lawsuits.

A decision consonant with *Amici's* argument would ensure proper maintenance of the traditional separation of powers. Courts are ill-equipped to make land use decisions. To impose new burdens on the courts in this area would administratively overburden the judicial system. At a time when local judicial systems are being challenged by popular discontent, and their traditional independence is being attacked, an expansion of judicial involvement in local legislative actions like the one at bar only exacerbates the growing threat to the constitutional doctrine of separation of powers at the local level.

Lastly, the case at bar suffers from the same defect as *Agins v. City of Tiburon*, ... U.S. ....., 65 L.Ed. 2nd 106

(1980) has considerable use of the property if it is considered as a whole.

ARGUMENTS

I

PENNSYLVANIA COAL IS OF DUBIOUS VALUE AS PRECEDENT IN THE DECISION OF TODAY'S LAND USE REGULATION CASES

The famous observation of Mr. Justice Holmes in *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415; 67 L.Ed. 322, 326 (1922) has become for appellants a magic phrase.

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . ." 260 U.S. 393 at 415.

Amici admit that Holmes' famous formula has become black letter law. However, *amici* strenuously urge that it is not susceptible of practical application, with the result that it has become primarily used as *obiter dictum* rather than as a foundation for consistent decisions arriving at the same result as *Pennsylvania Coal.*

There are a number of compelling reasons why *Pennsylvania Coal* does not provide a firm foundation or really any foundation at all, for an expansive decision by this court on the subject of police power regulation. First, Justice Holmes, the author of the phrase, seemed to deliberately leave it vague and did not support it with case authority. Second, the status of land as a social interest has changed dramatically since the 19th Century when Holmes formulated his thinking. Third, even after strenuous efforts

by a legion of learned commentators over the past half century, the Holmes formula has not resulted in a set of meaningful criteria with which society can predict results in this area.

A. The Holmes Opinion In Pennsylvania Coal Cannot Be Harmonized With Its Own Contemporaries

One of the fundamental reasons why the primary use of *Pennsylvania Coal* has been as *obiter dictum* in cases arriving at a different result is that it was an anomaly when written. A brief review of Justice Holmes' dissenting opinions in the landmark cases of *Lochner v. New York,* 198 U.S. 45 (1905); *Adkins v. Children's Hospital,* 261 U.S. 525 (1923), and *Truax v. Corrigan,* 257 U.S. 312 (1921), points out very clearly that Justice Holmes' remark in *Pennsylvania Coal* was seriously at odds with his prevailing judicial philosophy concerning deference to legislative determinations. The following passage from *Truax, supra,* indicates dramatically his attitude towards legislative discretion:

> "There is nothing I more depreciate than use of the 14th Amendment beyond the absolute compunction of its words to prevent the making of social experiments that an important part of the community desires . . . ." 257 U.S. 312 at 343.

It is entirely possible that Holmes' holding in *Pennsylvania Coal* was a reaction to a deep seated conviction about the contractual nature of land ownership. Holmes himself in a letter stated:

> "My ground (for decision) is that the public (i.e. the residential property owners) only got on this land by

> paying for it and that if they saw fit to pay only for the surface rights they can't enlarge it . . . ." *Holmes-Pollack Letters,* Mark de Wolf Howe (ed.), 108-109 (1941).

Perhaps Holmes himself was unintentionally revealing his bias when he wrote the opinion in *Block v. Hirsch,* 256 U.S. 135 (1920) upholding a rent control law challenged by landlords.

> "The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed, ..." 256 U.S. 135 at 155.

Some courts have distinguished away *Pennsylvania Coal* (while affirming its holding) by focusing on this aspect. For example in *McCarthy v. City of Manhattan Beach* (1953) 41 Cal.2d 879, *cert. den.,* 348 U.S. 817 (1954), the California Supreme Court characterized the *Pennsylvania Coal* action as: ". . . an action between two private parties, where the statute under attack admittedly destroyed previously existing right of property and contract . . . ," 41 Cal.2d 879 at 891.

B. The 1980's Model "Bundle of Sticks" Is Not the Same as the 1880's Model "Bundle of Sticks"

If Justice Holmes was transfixed by a special feeling for relationships involving real property, he was reflecting an ideological bias in favor of land, the only "real" property of traditional society. It is undeniable that in traditional society land did occupy a special place as not only the source of most wealth, but also as the framework for social activity and obligation. Yet, it is a very long way

indeed from the world of Blackstone to the world in which today's Blackacre exists. Land is no longer the basis for the social bond. Industrialization, mass education, and consumerism have long since made land more *an index* of wealth, rather than the sole source of it.

Modern land developers are business entrepreneurs, who treat land exactly the same way as other entrepreneurs treat other commodities. This observation is not intended to be pejorative, nor can it be in a nation that has grown strong and wealthy from the efforts of entrepreneurs. However, it does point out the inconsistency of appellant's arguments that the regulation of land should be treated as something separate and apart from other economic regulations that are judicially reviewed under a different standard.

In another way land has been changed in status over the past one hundred years. In the 19th century there was more land in the United States than the young nation could fully occupy. In 1980, in the minds of some, the situation is reversed: too many people on too little land. Because of this perceived scarcity, land has become in a very real sense "affected with the public interest." In a profound practical and philosophical sense land is the ultimate "common carrier". Yet appellants urge this court to bind the hands of government with respect to the regulation of land, while this Court permits great latitude in the regulation of freight trains and trucks.

In an era when much investment in land is characterized as "tax shelter" for the real wealth (and income) of the owner, even the conceptual and psychological bases for

the Holmesian distinction have been lost. With its basis gone the distinction is no longer tenable.

C. The Reasoning of Pennsylvania Coal Has Proved Inadequate To Serve As A Basis For Any Rational Analytical Framework

This court has recently acknowledged in *Penn Central Railroad Company v. City of New York*, 438 U.S. 104 (1978) that it has been unable to develop a "set formula" for determining when a regulation has transgressed the bounds of validity.

The commentators reviewing the case law based on *Pennsylvania Coal* have been somewhat less charitable. Professor Allison Dunham has characterized the cases as "a crazy quilt pattern" that has led to "floundering and differences among judges, and among generations of judges." Dunham, "*Griggs v. Allegheny County* in Perspective: 30 years of Supreme Court Expropriation Law" (1962) 63, *Sup. Ct. Rev.* 105. For Professor Arvo Van Alstyne "the decisional law is largely characterized by confusing and incompatible results often explained in conclusionary terminology, circular reasoning, and empty rhetoric." Van Alstyne "Taking or Damaging by Police Power: The Search For Inverse Condemnation Criteria", 44 So. Cal. L. Rev. 1 (1970).

Admittedly the area of police power regulation/inverse condemnation is conceptually the most difficult area of "taking" jurisprudence. The other three main categories of "takings" are much easier both to define and apply. An intended physical invasion of property by government

raises no problems. Neither does an unintended physical invasion. Both of these result from objectively discernible causes with objectively measurable results. The third category, where property suffers either an intangible detriment to value resulting from a governmental act (*e.g.*, loss of street frontage resulting from relocation of a street), or a non-physical invasion (*e.g.*, aircraft noise from government overflights) is more difficult. However, even in this type of case, there is always a physical act of government that intends a result.

For appellant to use, as it has, precedents arising from these three relatively settled areas of inverse condemnation liability not only confuses the present issue, but also indicates the lack of an adequate decisional framework for pure police power regulation cases. What decisional factors exist are vague or borrowed from Due Process cases. One of the leading students of the inverse condemnation problem is Professor Arvo Van Alstyne. In his 1970 article, "Taking or Damaging By Police Power: The Search For Inverse Condemnation Criteria" *supra*, he examines the cases arising under *Pennsylvania Coal* and concludes that the actual decisions of the courts may be tentatively based upon two main decisional factors: 1) the acceptability of the regulatory objective, and 2) the rational relationship of the enactment to the regulatory objective.

If this is a true general characterization of the hodgepodge of "taking" cases, then the courts have been analyzing police power regulation all along in conformance with the test of *Mugler v. Kansas*, 123 U.S. 623 (1887) *supra*, rather than *Pennsylvania Coal*, acknowledging the latter only in an initial obeisance, or to buttress a result.

D. Pennsylvania Coal Should Be Overruled or Limited to Its Facts

It has been shown above how uneasily the decision in *Pennsylvania Coal* rests on its foundation. To arrive at his holding Holmes ignored a distinguished line of previous Supreme Court cases, as well as several of his own impassioned dissents. There is a strong implication arising from the historical circumstances of the *Pennsylvania Coal* decision that Justice Holmes really did not intend his language to do anything more than achieve an immediate result. As noted above, his entire judicial philosophy was at odds with the basis of his decision. Consistent with this evaluation is the shorthand, cryptic, nature of his invocation of the "Taking Clause". Perhaps all that this famous phrase reflects is an understandable desire on the part of Holmes to avoid use of the substantive due process rhetoric he so detested. (See *e.g., Lochner v. New York, supra*). Using the Fifth Amendment rather than the Fourteenth he neatly avoided a charge of inconsistency with his previous statements on the subject of government regulation.

His own decision in *Block v. Hirsh, supra,* provides a clue that buttresses this interpretation. In upholding a government's police power regulation (a rent control ordinance) he stated:

> "For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort, pressed to a certain height, might amount to a taking *without due process of law.* (emphasis supplied) 256 U.S. 135 at 156

The last phrase involves the Due Process clause of the Fourteenth Amendment, and raises the intriguing question: why was Holmes using the Due Process clause in analyzing a police power regulation involving real property? The only answer that seems to reconcile *Block* with *Pennsylvania Coal* is that Holmes was upholding the regulation in *Block* (as he would in *Lochner* and the others), whereas he was invalidating the regulation in *Pennsylvania Coal* and wanted to avoid the necessity of making a distinction.

Recently the New York Supreme Court has reviewed the cases under *Pennsylvania Coal* and agreed that what is actually being used in land use regulation cases is the Due Process clause of the Fifth and Fourteenth Amendments rather than the Taking clause of the Fifth.

> "Close examination of the cases (following *Pennsylvania Coal*) reveals that in none of them, . . . was there an actual 'taking' . . . Instead, in each the gravamen of the constitutional challenge was that it was an invalid exercise of the police power under the due process clause, and the cases were decided under that rubric." *Fred F. French Investment Co. v. City of New York*, 385 N.Y.S., 2d 5, at 8-10, 350 NE2d 381, appeal dismissed, 429 U.S. 990 (1976).

The explicit overruling of *Pennsylvania Coal* would do no violence to the decisions of this Court that purport to follow it. To the contrary such an action would unify and harmonize the Supreme Court case law that has been decided since. *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) provides a good example. In *Goldblatt* the court

quoted the case of *Mugler v. Kansas* (1887) 123 U.S. 623 as follows:

> "The present case must be governed by principles that do not involve the power of eminent domain . . . The (police) power . . . is not . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses . . ."
> (123 U.S. at 668, 669)

The opinion then went on to list a number of non-real property Due Process cases as controlling precedent. Among them are *Bibb v. Navajo Freight Lines Inc.* (1959) 359 U.S. 520, 529; *U.S. v. Carolene Products Co.* (1937) 304 U.S. 144, 154. The important point is that from *Mugler* to *Bibb* the test of validity of regulation has been whether "laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory . . . *Nebbia v. New York,* 291 U.S. 502 at 537 (1934). The balancing test of *Pennsylvania Coal* cannot be reconciled with these cases.

Some courts have avoided the problem of *Pennsylvania Coal* by simply using the rationale and analysis of Justice Brandeis' dissent. See, *e.g., Just v. Marinette County,* 56 Wis. 2d 7, 201 N.W.2d 761 (1972).

There is also support for the position that *Pennsylvania Coal* if not overruled, could be limited to its specific fact situation and treated as a case where state action operated to impair substantially use of one private property owner's land by authorizing in essence the invasion of it by other private property owners. Many courts have already in effect adopted this view of *Pennsylvania Coal.* See *e.g.,*

McCarthy v. City of Manhattan Beach, 41 Cal.2d 879 (1954); *Marblehead Land Co. v. City of Los Angeles* (9th Cir. 1931) 47 F.2d 528; *Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 C.2d 515, appeal dismissed, 371 U.S. 16 (1962).

It is obvious that something must be done with the taking issue. The state and intermediate federal courts are floundering without any meaningful interpretation of *Pennsylvania Coal* and its doubtful progeny. Municipal administrators nationwide are confused and frequently intimidated by an area of the law that seems to produce absolutely no predictability. Neither side in this issue is favored by the present confused state of the law.

E. A "Taking" in the Pennsylvania Coal Sense Does Not Necessarily Imply "Just Compensation"

There is a third alternative solution to the *Pennsylvania Coal* problem, and that is the one adopted by the California Supreme Court in *Agins v. City of Tiburon*, 24 Cal.3d 266 (1979). In *Agins* the California Supreme Court recognized the concept of a police power regulatory "taking" under *Pennsylvania Coal*, but refused to equate the existence of a "taking" with the necessity for the payment of just compensation. Rather, the Court held that invalidation of the offending regulation is the only judicial remedy available.

There are a number of compelling reasons why this result is consonant with both U.S. Supreme Court precedent and with the compelling social factors of which this Court is ever mindful. First, and most dramatic, is the fact that this result perfectly mirrors the result in *Pennsylvania*

Coal itself. The court in *Pennsylvania Coal* did not order the State of Pennsylvania to pay the fair market value of all coal that would have been lost under the statute in question. The Court simply invalidated the statute and dissolved an injunction based on it.

In direct contradiction to appellant's claim that the precedents of this Court require payment of a monetary award, few, if any, of the Federal cases arising under *Pennsylvania Coal* have actually ordered the payment of just compensation where a land use regulation has been challenged. As the First Circuit Court of Appeals noted in a recent decision:

> "Our research has disclosed no case in which a federal court has ordered a state or local government unit to pay for a diminution of the value of a piece of property caused by a zoning regulation."
> *Pamel Corporation v. Puerto Rico Highway Authority,* 621 F.2d 33 at 35 (1980).

Another compelling factor is that the rule urged by appellant requiring the payment of just compensation wherever a regulation is excessive does not adequately address the unintended nature of the result. Appellant argues that local government always secretly intends the perfidious results of its regulation. However, common sense indicates that the reverse must be true in many cases. It is no secret that many local legislative bodies are made up of persons without the necessary expertise or guile to engage in legislative fraud. Neither is it a secret that many local administrative agencies do not operate with absolute freedom from mistake, bureaucratic rigidity, and lack of adequate direction. Nor should it be forgotten

that the overwhelming majority of local legislative officials are land owners themselves, whose respect for, and allegiance to, traditional notions of American constitutionalism cannot and should not be questioned.

Adoption of Appellant's theory, that payment of monetary compensation is the only remedy available where a police power regulation is found to be excessive, would create a curious anomaly in eminent domain law. Most states permit condemning agencies to abandon direct condemnation at any time up to the point where title may actually be vested in the governmental agency. See *e.g.* Cal. Code of Civ. Prod. § 1268.510. The theory upon which the statute is based is that condemning agencies, who are often subject to fiscal constraints and shifting legislative priorities, should have the freedom to restore the *status quo ante* and avoid payment of just compensation.

The invalidation rule of *Agins, supra,* would permit essentially this same result. The rule urged by appellant herein would give property owners in inverse condemnation actions greater rights than property owners in direct condemnation actions.

II

THE PRAGMATIC AND POLICY RAMIFICATIONS OF THIS CASE ARE OF OVERWHELMING IMPORTANCE

The cities and municipal associations joined as amici herein will be directly and fundamentally affected by the decision in this case. As municipalities they have been delegated basic land use regulatory power. The provision

of urban services to land is the very *raison d'etre* for the existence of a city.

As demand for increasingly sophisticated and expensive public services has grown, so has the necessity for a concommitantly broad land use regulatory authority. Because of the possibility that the outcome in this case could result in the affixing of a price tag, uncontrolled by the municipalities, on the exercise of this broad regulatory authority, it is important to examine the potential impact of the development of an inverse condemnation compensation remedy on municipal activities.

A. Modern Regulation More Often Involves the Timing and Direction of Development Than Long Term Prohibition of Use

Many inverse condemnation cases, and potential condemnation cases, involve so-called "fringe lands" that are limited to non-urban uses by a comprehensive land use plan. Often these lands were purchased by persons with "investment backed expectations" of immediate development. Those lands that cannot be immediately developed pursuant to a City's growth management plan are placed in so-called "holding zones" where they must await the arrival of orderly urban growth. Although this often results in dramatic reduction in potential value of land, it is the very foundation of modern land use management and the only practical way to avoid uncontrolled urban sprawl.

Urban sprawl is perhaps the greatest single problem confronting American society today. Certainly it is the pre-

dominant feature of many portions of the contemporary landscape. The U.S. Congress is presently engaged in the process of assessing the threat posed by urban sprawl, and proposing legislative remedies. See *e.g.*, "Compact Cities: Energy Saving Strategies for the '80's," (Report of the Sub-committee on the City of the Committee on Banking, Finance and Urban Affairs, House of Representatives, July 1980). Similarily State legislatures are involved in the effort to ameliorate and, if possible, correct the worst consequences of this phenomenon. (See *e.g. An Urban Strategy for California* (Feb. 1978), Cal. Office of Planning and Research.).

The economic pressures leading to urban sprawl are great. Real estate developers are not unaware that a market exists for suburban housing. They also recognize that the further one travels into the countryside, the cheaper is the price of raw land. These twin factors— high demand and cheap fringe land—have created the crazy quilt pattern of urbanization so characteristic of many parts of the country.

One can argue that this pattern represents the failure of modern planning. In a sense, that is true. Yet the charge can only be assessed in light of the constraints placed on urban planners within the time period during which it occurred. It should not be forgotten (indeed it is important to an understanding of the present case) that the significant "land use wars" of the past twenty years have been fought over the validity of comprehensive growth management plans. For years, the issue of timing controls was fought bitterly in state courts all over the country. See

e.g. Golden v. Planning Board of Town of Ramapo, 30 N.Y. 2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972); *Associated Home Builders, etc. Inc. v. City of Livermore,* 18 C.3d 582, 135 Cal.Rptr. 41, 557 P.2d 473 (1976); *Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court,* 13 C.3d 225, 118 Cal.Rptr. 158, 529 P.2d 582 (1974); *Deutsch,* "Land Use Growth Controls: A Case Study of San Jose and Livermore, California" (1974), 15 Santa Clara Lawyer 1. Without the practical ability to control, either singly or in concert with other agencies, the timing of development on the fringes of urbanization, the effectiveness of growth management ceases to exist.

For twenty years there was great uncertainty in the law, and thus in the minds of planners and local legislators, about the inherent authority of cities to engage in growth management and timing control. Now, after definitive judicial decisions in favor of such local authority have been rendered, there has been a sudden shift in tactics by unhappy landowners and the inverse condemnation action has entered into its heyday.

It is clear to anyone who has been trapped in a suburban traffic jam at commute time or has read newspaper accounts of the growing dependence of the United States on the most strategic raw material of modern industrial society, oil, that the consequences of urban sprawl are greater than merely the professional discomfiture of the local planner.

The consequences are both local and national in scope. "Leap frog" developments consume vast amounts of local capital for roads, bridges, gas, water and sewer lines,

libraries, clinics, hospitals, and public safety services. In many cases, it is impossible to plan for the most efficient alignment and installation of such facilities or the provision of services simply because many or most of the parts of the puzzle are lacking. The per customer cost of providing underutilized suburban infrastructure is enormous See, *e.g. "Compact Cities" supra,* at 14.

Subregional and regional impacts are even more dramatic. It has been estimated that transportation use alone consumes 60% of the petroleum used in the United States. It is estimated that 900 billion passenger miles are driven daily in urban areas by autos occupied by only 1.6 persons. "Urban Transportation and Energy: Potential Saving of Different Modes", Congressional Budget Office, Washington, D.C., December, 1977.

Another disturbing national consequence of uncontrolled urban sprawl is the destruction of prime agricultural land. It has come, perhaps as a rude shock to a nation accustomed to being characterized as the proverbial cornucopia, that there are limits to the potential productivity of its farm land. The General Accounting Office in 1979 concluded that an estimated 3 to 5 million acres per year of farm land are being converted to non-farm use. "Preserving America's Farm Land—A Goal The Federal Government Should Support", General Accounting Office, Washington, D.C. 1979. This process is both accelerated, and aggravated, by the effects of "leap frog" development. Parcels of agricultural land that are not converted become isolated and thus unsuited for agricultural operations because of proximity to urban development. This destructive process

is exacerbated by the historical fact that many cities originated as support and processing centers for highly productive agricultural areas. Uncontrolled urban sprawl can thus destroy at the same time both fertile land and the very reason for a city's original existence.

The consequences detailed above involve both direct and indirect costs to the municipalities forced to carry out their functions in a setting of urban sprawl. However, these costs are overshadowed by the dramatic negative potential of adverse judgments in inverse condemnation actions. It is unfortunate that both inflation and the "taxpayer's revolt" have resulted in municipal budgets less capable of absorbing fiscal blows than ever before in recent history. As more social demands are being placed on cities by the pressing needs of society, greater flexibility is required. That flexibility would only be decreased by acceptance of the theory of appellant herein.

III

REGULATION OF GROWTH IS PROPERLY HOUSED IN THE LEGISLATIVE FORUM, NOT THE JUDICIAL FORUM

Legislative bodies are uniquely equipped to make land-use decisions under our form of government. They are the composite mind of the body politic. Recognition that there may be flaws in that system does not dictate that it should be supplanted by the courts. Cities are, in modern society, the most appropriately equipped political bodies to deal with the needs and desires of the individual citizens that populate them. City government represents the heartbeat of community attitude and belief. Ever since *Euclid v. Am-*

bler Realty Co., 272 U.S. 365, 71 L.Ed. 303 (1926), local agencies have practiced and experimented with meeting the changing needs of society and its citizens.

The courts have always stood as a check on the exercise of land regulation, but they have never been equipped with the expertise necessary to reconcile the social and economic goals that often conflict in complicated land-use decisions. Rather, courts, because of their transitory involvement, are inclined to consider only a piece of the legislative quilt, not fully recognizing that the whole is made up of the individual pieces. This is not to suggest that courts should analyze the whole. However, it does suggest that the traditional rule of judicial deference to legislative determinators should be maintained in the complicated and sensitive area of land use.

> "California is attempting to grapple with difficult land use problems through new policies and new mechanisms of regulation. The state is also struggling with the problem facing cities and counties in those cases where their zoning efforts to preserve open space in response to the state's announced policy . . . may unwittingly have resulted in seizure of property rights that they did not intend and cannot afford. Federal Courts must be wary of intervention that will stifle innovative state efforts to find solutions to complex social problems."
>
> *Sederquist v. City of Tiburon,* 590 F.2d 278, at 281 (9th Cir. 1978). Quoting *Rancho Palos Verdes Corp. v. City of Laguna Beach,* 547 F.2d 1092, at 1095 (9th Cir. 1976).

The judicial procedure demanded by appellant pays little or no attention to the financial ability of a city to fund the

forced purchase, nor does it ascertain whether the city really wants or needs to add to its land inventory. Preferably, a city when found to have regulated excessively should be able to make a choice between rescinding the regulation or buying the property.

Amici admit that in the circumstances of today's crowded and complex world that it is often necessary for a city to adopt land control regulations that may frustrate the land use plans of private property owners. Yet land investment in many ways is no different than investing in the stock market where fortunes may be made and lost in a day. One certainly would not expect to hear appellant (a large publicly held corporation) suggest that it has to "justly compensate" all of its stockholders if the market has a severe downturn. Yet appellant demands in the public arena a greater stability of expectation than it can achieve in the private marketplace.

Appellant places great emphasis on the fact it *thought* it could build out the property as a power plant. Appellant is undoubtedly placing reliance on this Court's pronouncement in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) that "distinct investment backed expectations" may be so seriously interfered with as to constitute a taking. However this Court in the very same case, has stressed that something beyond belief in a favorable outcome is required where a property owner speculates in undeveloped land. That assertion also runs contrary to this court's opinion in *Penn Central* wherein it was noted that:

> . . . the submission that appellants may establish a 'taking' simply by showing that they have been denied

> the ability to exploit a property interest that they heretofore *had believed* was available for development is quite simply untenable." *Penn Central Transportation Co. v. New York City, supra* at 130. (emphasis added)

Appellant suggests that government regulation is driving the price of land out of the reach of the very citizens that are supposedly protected by the regulation. *Amici* suggest that appellant confuses the financial impact of regulation with the impact on the marketplace of that type of speculative investment that appellant argues should be protected from regulation. If expectations of economic profit are important to the investor, so are expectations of a decent and secure future important to the citizens that carry on their daily lives in our cities. As this Court has emphatically stated, citizens have the right to live in pleasant surroundings where communities are "beautiful as well as healthy, spacious as well as clean, well balanced as well as carefully patrolled." *Berman v. Parker,* 348 U.S. 26, at 32-33, 99 L.Ed. 27 (1954). [See also *Village of Belle Terre v. Boraas,* 416 U.S. 1, 39 L.Ed.2d 797 (1974)].

Amici are also concerned about the "chilling effect" that could easily result if inverse condemnation becomes a readily available remedy. The legislative bodies of by far the majority of cities and towns in this country are composed of citizens who contribute their time for little or no money. These local governments are anything but professional. Rather, they tend to reflect a cross section of the communities they represent.

The National Association of Manufacturers, *amicus* for Appellant, ridicules this proposition. Amicus Brief, Pages 16-17. The Association attempts to paint a picture of "big government" oppressing the "little man". However, in fact, the "little man" is often a giant corporation with economic resources that dwarf the municipality it confronts. A case in point that was recently decided in the U.S. District Ct. for the Northern District of California is *Oceanic California Inc. v. City of San Jose,* Civil No. C-78-2622-AJZ, (Motion to dismiss granted August 21, 1980). In that case, the City of San Jose was ranged against a subsidiary of Castle and Cooke, Inc. While admittedly San Jose, as the fourth largest city in California, is hardly a village, the annual revenues of Castle & Cooke exceed those of San Jose by approximately a factor of four. San Diego Gas & Electric, appellant herein, occupies a similar position vis-à-vis the Appellant City of San Diego.

IV

AN INVERSE REMEDY WILL UNREASONABLY IMPACT JUDICIAL ADMINISTRATION

The very existence of a pot of money at the end of litigation encourages land-use litigation. The City of San Jose has expended over $200,000 in attorneys' fees alone in the past two years just to defend two cases alleging inverse condemnation brought in Federal District Court. *Barbaccia v. County of Santa Clara, et al.,* Civil No. C-7601182 S.W., N.D. Cal. (Judgment entered in favor of defendant June, 1980). *Oceanic, supra.* An enormous amount of Federal District time has also been expended.

The judicial mechanism used to evaluate the monetary impact of land use regulation is cumbersome and expensive. Direct condemnation cases themselves are notoriously lengthy, complicated and difficult to try to a jury. Where the natural arguments over value are coupled with the elusive quality of the police power taking issue, the resulting litigation cannot be characterized as "routine". A judge sitting in such a case will have to exert extraordinary care and vigilance to keep a jury from indulging a punitive impulse when assessing the market value of land taken.

V

THE UNRESOLVED "SINGLE PARCEL" ISSUE

The record in this case indicates that the trial court considered only a portion of appellant's entire parcel of property and found a "taking" as to only that portion. The entire parcel comprised some 412 acres. Appellant's Brief Page 5. The trial court apparently decided in the 200+ acres which fell within the general plan designation of open space was to be considered by itself for purposes of the "taking" analysis. The question that naturally arises is: what happened to the remainder?

Apparently there was a use for the remainder which was valuable. The trial court ignored this portion and, in the opinion of *amici*, improperly ruled that Appellant's property had no remaining value. Unfortunately, the record is vague on this point. However, the impact of the trial court's silent subdivision of the property is substantial if approved by this Court.

Such a result runs afoul of the clear line of cases decided in the United States Supreme Court. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 8 L.Ed.2d 130 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394, 60 L.Ed. 348 (1915).

> " 'Taking' jurisprudence *does not divide a single parcel* into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central Transportation Co. v. New York City, supra,* at 130. (emphasis added)

Although this issue was not argued in the court below, its existence in the factual context of this case raises a serious question as to the propriety of this appeal. The cases cited above clearly establish the rule that the property owner may not segregate his property interests for the self-serving purposes of inverse condemnation litigation. Amici respectfully urge this Court to seek clarification of this potentially crucial issue before ruling on the instant appeal.

CONCLUSION

Oliver Wendell Holmes, dissenting in *Lochner v. New York, supra,* stated: "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion . . . ." *Amici* feel that the same can surely be said of any dogmatic interpretation of a constitutional provision. The dominant opinion of the people of this country, as expressed by their legislators and laws, seeks a redress of a perilous im-

balance between unrestricted growth and the fundamental needs of society.

For all the reasons set forth *Amici* respectfully urge this Court to affirm the decision of the court below.

Respectfully submitted,

ROBERT J. LOGAN
CITY ATTORNEY
COUNSEL OF RECORD
GARY B. REINERS
SR. ASSISTANT CITY ATTORNEY
Attorneys for Amicus Curiae

(Appendices follow)

Appendix "A"

NATIONAL LEAGUE OF CITIES AND CALIFORNIA CITIES JOINING IN THIS BRIEF

NATIONAL LEAGUE OF CITIES

Alan Beals, Executive Director

Ross Davis

Davis & Simpich

910 - 16th St., N.W.

Washington, D.C. 20006

PARTICIPATING CALIFORNIA CITIES

Alameda
Carter J. Stroud
City Hall
Alameda, CA 94501

Burlingame
Jerome F. Coleman
City Hall
501 Primrose Road
Burlingame, CA 94010

Carmel-by-the-Sea
George W. Brehmer
P. O. Box 221130
Carmel, CA 93922

Commerce
William Camil
P. O. Box 8743
San Marino, CA 91108

Concord
David J. Levy
Concord Civic Center
Concord, CA 94519

Del Mar
D. Dwight Worden
1050 Camino Del Mar
Del Mar, CA 92014

Duarte
William Camil
P. O. Box 8743
San Marino, CA 91108

Garden Grove
Eric Lauterer
11391 Acacia Parkway
Garden Grove, CA 92640

Hayward
John W. Scanlon
22300 Foothill Blvd.
Hayward, CA 94541

Larkspur
Joseph A. Forest
P. O. Box 585
Larkspur, CA 94939

Los Angeles
Burt Pines
Room 1800
200 North Main St.
Los Angeles, CA 90012

Modesto
Elwyn L. Johnson
P. O. Box 642
Modesto, CA 95353

Novato
Joseph A. Forest
901 Sherman Avenue
Novato, CA 94947

Palmdale
James S. Kostas
708 E. Palmdale Blvd.
Palmdale, CA 93550

Palm Springs
William J. Adams
P. O. Box 1786
Palm Springs, CA 92262

Petaluma
P. Lawrence Klose
P. O. Box 61
Petaluma, CA 94952

Portola Valley, Town of
James T. Morton
Wilson, Morton, Assaf & McElligott
P. O. Box 152
San Mateo, CA 94401

Sacramento
James P. Jackson
812 Tenth Street, Suite 201
Sacramento, CA 95814

San Jacinto
Donald C. Wickham
Wickham & Bloom
133 N. Buena Vista, Suite 3
Hemet, CA 92343

Santa Clara
Edwin J. Moore
City Hall
1500 Warburton Avenue
Santa Clara, CA 95050

Santa Fe Springs
William Camil
P. O. Box 8743
San Marino, CA 91108

Stockton
Gerald A. Sperry
City Hall
Stockton, CA 95202

Tiburon
Robert I. Conn
1534 Fifth Avenue
San Rafael, CA 94901

Walnut Creek
Daniel J. Curtin, Jr.
City Hall
Walnut Creek, CA 94596

Appendix "B"

Although Rule 42 permits submission of this *amicus* brief of City of San Jose by its authorized law officer, City Attorney Robert J. Logan, without the written consents of the parties, *amicus* City has solicited and obtained consents from the parties nonetheless, so as to assure compliance and advise the parties of City's interest. Those consents are included in Appendix B to this brief.

Office of
City Attorney
City of San Jose [Letterhead]

Robert J. Logan
City Attorney

September 2, 1980

Louis E. Goebel, Esq.
Luce, Forward, Hamilton & Scripps
1700 Bank of California Plaza
San Diego, CA 92101

Re: San Diego Gas & Electric Co. v.
City of San Diego, et al,
United States Supreme Court
No. 79-678

Dear Mr. Goebel:

The City of San Jose desires to file a brief amicus curiae in the above captioned case now pending before the United States Supreme Court. Although Rule 42 permits submission of this amicus brief of the City by its authorized law officer without consent of the parties, the City of San Jose solicits, on its behalf and on behalf of other cities who will be joining in this brief, your consent for its filing.

Sincerely yours,
/s/ Robert J. Logan
Robert J. Logan
City Attorney

RJL:lb

On behalf of the attorneys for the Appellant, San Diego, Gas & Electric Company, I hereby give such consent.

/s/ L. E. Goebel
Louis E. Goebel

Office of
City Attorney
City of San Jose [Letterhead]

Robert J. Logan
City Attorney

September 2, 1980

C. Alan Sumption, Esq.
Deputy City Attorney
City Administration Bldg.
202 C Street
San Diego, California 92101

Re: San Diego Gas & Electric Co. v.
City of San Diego, et al,
United States Supreme Court No. 79-678

Dear Mr. Sumption:

The City of San Jose desires to file a brief amicus curiae in the above captioned case now pending before the United States Supreme Court. Although Rule 42 permits submission of this amicus brief of the City by its authorized law officer without consent of the parties, the City of San Jose solicits, on its behalf and on behalf of other cities who will be joining in this brief, your consent for its filing.

Sincerely yours,
/s/ ROBERT J. LOGAN
Robert J. Logan, City Attorney

RJL:lb

On behalf of the attorney for the Appellee, City of San Diego, I hereby give such consent.

John W. Witt, City Attorney
By /s/ C. ALAN SUMPTION
C. Alan Sumption
Deputy City Attorney